(17)

* IN THE HIGH COURT OF DELHI

\+ OMP No. 69 of 2001

% Date of decision : 14.03.2006

M/S. INDIAN FARMERS FERTILISER COOP. LTD. ...Petitioner
Through : Nemo.

- V E R S U S -

M/S. E. GREAT (I) & CO. & ANR. ... ...Respondents
Through : Mr. Parveen Mehdirata, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJAY KISHAN KAUL, J. (ORAL)

1. A tender was floated by the petitioner for award of contract for waterproofing of the roofs and terraces of the residences of IFFCO Township at Aonla, near Bareilly, U.P. The respondent was the successful tenderer and a contract was awarded to the respondent by the petitioner on 10.02.1986 whereby the work of waterproofing was to be completed within a period of 15 months from the date

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of the contract. It may be noticed that as part of the tender, the respondent submitted an alternative proposal 1-C using the process of Mud Phaska. However, the contract, which was awarded, was as per the original tender.

2. It appears that the respondent started execution of the work as per the contract, but some discussions ensued between the parties on the issue of this alternative 1-C. A communication was addressed by the Architects and Consultants of the petitioner on 06.05.1986 to the respondent stating that the alternative proposal 1-C may be followed. This communication was responded to by the respondent vide letter dated 12.05.1986 expressing its concern at the belated acceptance of this alternative proposal and bringing forth the fact that there had been intervening market conditions which would require revision of the rate. This alternative proposal as per the original tender was to be carried out at Rs.81/- per sq. mtr. and the same was sought to be enhanced to Rs.91/- per sq. mtr., especially on account of the upward trend in US $, additional cost of all petroleum products and hike in the prices of synthetic rubber. In this behalf, it may be

noticed that the terms and conditions of the tender as per clause 8 provided for the validity period of quotations to be 90 days from the date of opening of the quotations. Thus, though the original contract was awarded within the period of 90 days, the communication of 06.05.1986 was stated to be beyond the said period.

3. The petitioner issued an amendment to the original contract dated 10.02.1986 on 13.05.1986 asking the work to be done as per alternative 1-C @ Rs.81/- per sq. mtr. A communication was also addressed by the petitioner on 05.06.1986 stating that the petitioner had awarded the work on the understanding that the original prices would hold good and, thus, objecting to the letter of the respondent dated 12.05.1986. Some further discussions ensued resulting in the letter dated 16.10.1986 of the respondent informing the petitioner that the waterproofing work as per alternative 1-C had commenced and requesting the case of the respondent to be considered on merits as per the letter dated 12.05.1986. There has been simultaneous exchange of letters whereby the petitioner issued a letter dated 06.10.1986 requiring Mud Phaska job to be completed

urgently. It is the submission of the respondent that there were assurances held out to the respondent that the rates would be revised suitably.

4. The final bill was raised by the respondent on 15.06.1988 and it is not disputed that prior to raising of the final bill, the running bills were not raised as per the increased rates demanded by the respondent. As per the respondent, this was so done on account of the fact that the matter was under discussion and only on receipt of formal approval, could the bills have been raised as per the new rates.

5. Even after the final bill was raised, the discussions ensued between the parties, but since no finalisation could take place, the respondent filed a petition under Section 20 of the Arbitration Act, 1940 (hereinafter to be referred to as, 'the said Act') being Suit No. 1968/1993. This petition was disposed of only on 11.03.1998 by consent of parties whereby Justice J.K. Mehra (Retd.) was appointed as the Sole Arbitrator to adjudicate upon the disputes.

6. The Arbitrator has made and published the Award dated 30.10.2000 and the petitioner aggrieved by the same has filed the present objections under Sections 30 and 33 of

the said Act.

7. It may be noted at the inception that a question had arisen in the present proceedings as to whether the provisions of the said Act would apply or of the Arbitration and Conciliation Act, 1996. This issue, in my considered view, is no more *res integra* in view the judgment of the Apex Court in Milkfood Ltd. V. GMC Ice-cream Pvt. Ltd., 2004 (7) SCC 288. In the said case, it has been held by the Apex Court that the arbitration is deemed to commence when a notice requiring appointment of an arbitrator is sent by one party to the other. A distinction was also drawn between commencement of arbitration proceedings and commencement of proceedings before an arbitrator. In the present case, the petition under Section 20 of the said Act was admittedly filed in the year 1993. Not only that, the parties also understood the arbitration proceedings as apparently under the said Act and continued to extend time for making of the award. In any case, learned counsel for the respondent states that nothing really would turn on this issue now as the Court may examine the present objections within the scope of Sections 30 and 33 of the said Act.

8. A perusal of the Award shows that one of the main issues raised by the petitioner was in relation to the plea of limitation. This plea arose from the fact that the final bill was submitted on 15.06.1998 and the payment had to be made within 45 days of the said bill being raised as per clause 2(c). If the period of three years is counted from the expiry of 45 days, filing of the petition under Section 20 of the said Act itself would be beyond the stipulated date.

9. In respect of the aforesaid plea, the Arbitrator has taken note of testimony of the witness of the petitioner itself. Mr. A.K. Jain, DW-2, has stated that the Consultants forwarded the final bill for payment to IFFCO on 09.06.1989. The witness has stated that the petitioner addressed four or five letters to the respondent asking for certain further particulars like labour payment certificate duly certified by the Manager (Personnel) of the petitioner and site-clearance certificate certified by the Civil Department. Such requisitions are stated to have been made vide letters 21.11.1989, 12.12.1989, 02.01.1990, 11.01.1990 and 17.01.1990. The witness further stated that the bill was finalized some time after the respondent

vacated the quarters allotted to it, which was in February, 1991. In fact, the witness stated, *"The Bill must have been finalized after February, 1991"*. The petitioner was filed in the year 1993. The Arbitrator, thus, took into consideration these factors to come to the conclusion that the matter was kept alive and, in fact, the petitioner itself failed to finalise the bill at least till February, 1991. The petition filed under Section 20 of the said Act was, thus, within the stipulated period of time and the disputes cannot be said to be barred by time. There could not be said to be any refusal prior to February, 1991 and the period of three years would lapse at best in the end of February, 1994. Learned counsel for the respondent in this behalf has also invited attention of this Court to the letter dated 30.09.1991 of the petitioner stating that the matter of settlement of bill was being taken up with the Architects / Consultants and, thus, the question of appointing an arbitrator at that stage was premature and uncalled for. This letter has also been taken into consideration by the Arbitrator.

10. The petitioner in the grounds of challenge in the present petition has also laid great emphasis on this fact of the

claim of the respondent being barred by time. For the reasons aforesaid, this plea cannot be accepted.

11. In the grounds of challenge, the petitioner has also impugned the view taken by the Arbitrator that a synthesis should be made between the old Act and the new Act and, thus, the approach of the Arbitrator was stated to be fallacious. As noticed above, since the objections have been considered under Sections 30 and 33 of the said Act, there would be no material bearing on this issue as the claims are being examined as awarded by the Arbitrator and the question of limitation, in view of what has been discussed above, would not survive and has to be answered in favour of the respondent.

12. The first claim of the respondent considered by the Arbitrator relates to the uneconomical pattern of release of workforce, which was rejected. Similarly, the second claim for excess labour and escalation of cost has also been rejected.

13. The claim relating to the enhancement for increased rate as per the alternative 1-C being claim No. 4 has, however, been granted.

14. In respect of the aforesaid, it has to be appreciated that

this alternative 1-C was a thought process and proposal of the respondent itself, which really did not form part of the original tender. Even if it is assumed that this was a proposal as part of the tender, clause 9 of the conditions of the tender itself provided that the rates would remain firm for a period of 90 days from the date of opening of the quotations. The contract was awarded to the respondent on 10.02.1986 as per the original tender. The question of waterproofing being done through the proposal alternative 1-C for the first time arose in the communication of the petitioner dated 06.05.1986 beyond the stipulated period of 90 days. The respondent was, thus, within its right to ask for increase of rates and stated as much in its communication dated 12.05.1986. This matter continued thereafter. It is no doubt true that the witness of the petitioner CW – 1, Mr. J.P. Shad, has stated in his testimony that the bill for escalation as well as extra expenses was raised only in the final bill and not in the monthly bills. This was stated to be permissible in view of clause 5 of the Second Schedule to the terms and conditions providing for final bill since no claim was to be entertained after receipt of the final bill. Learned counsel

for the respondent stated that in view of continuance communications in this behalf and the matter being discussed, it is only at the stage of final bill, this amount was raised and the same was permissible as per the terms and conditions of the contract discussed above as clause 9 of the original tender conditions provided for the prices to remain firm only for a period of 90 days. The Arbitrator has, thus, awarded the rate of Rs.91/- per sq. mtr. for the alternative 1-C and the differential amount, thus, awarded is Rs.2,89,738.80.

15. It must be noticed at this stage that this Court does not sit as a court of appeal over an award and does not re-appreciate the evidence. It is only in the eventuality of the award being absurd that interference would be called for since reasonableness is not a matter to be considered by this Court. In this behalf, judgment of the Apex Court in Food Corporation of India v. Joginderpal Mohinderpal & Anr., (1989) 2 SCC 347 may be taken note of. The Supreme Court has also observed in M/s Sudarsan Trading Co. v. Govt of Kerala, AIR 1989 SC 890 that insofar as the interpretation of the contract is concerned, the same is a matter for the arbitrator on which the court does not

substitute its own decision. So long as the view taken by the arbitrator is plausible, though perhaps not the only correct view, the award cannot be examined by the court. In such a situation, the High Court was held to have no jurisdiction to examine the different items clause by clause as awarded by the arbitrator and to hold that under the contract, these were not sustainable in the facts found by the arbitrator. The challenge to this claim awarded is, thus, rejected.

16. Claim No. 5 is on account of sales-tax. The amount was deducted, but was stated to be deposited by the petitioner with the Government. The contract provided that all taxes are to be payable by the contractor and it is only in cases excess deduction had been made, could the petitioner be made liable. The respondent produced the circulars of the U.P. State Sales-tax Department providing for deductions from running bills. The Arbitrator, thus, awarded the amount of Rs.59,067/- only on account of the excess amount deducted by the petitioner leaving it open for the respondent to challenge the levy in a court of law. This claim can hardly be faulted as the petitioner cannot deduct excess amount of sales-tax, which is not deposited

with the Government. The finding has been arrived at on consideration of the evidence led before the Arbitrator not calling for any interference by this Court.

17. The sixth claim is on account of the expenses incurred by the respondent for excess stay of its persons at site. The Arbitrator has taken note of the statement of the witness of the petitioner admitting that the respondent was required to set up site office, which remained in existence even after May, 1987 up to December, 1987. The petitioner also released cement during this period of time, which had to be kept by the respondent in its safe custody and maintenance of site office was also required, the details of which were given in the claim. However, no records of exact expenditure were produced by either of the parties. The petitioner failed to produce material to show as to on what grounds was this amount included by the respondent in the final bill rejected as record was stated to be destroyed. Since the site-office was existing, the Arbitrator found that the burden was on the petitioner to show as to why the respondent would not be liable to be compensated for the same. The claim was accordingly allowed and this reasoning of the Arbitrator does not call

for any interference.

18. The seventh claim was on account of excess cement used and the matter is one of pure calculation, which has been gone into by the Arbitrator and does not call for any interference. The eighth claim is also linked in a manner as the actual quantity of cement used was found to be only 649 MT as per the own witness of the petitioner rather than 660.05 MT charged for by the petitioner and it is only the excess charges to the tune of Rs.13,260/- which has been allowed calling for no interference.

19. The last claim allowed of the respondent is for non-payment of 369.43 sq. mtrs. of Brick Coba work which was deducted from the final bill. The reason for this deduction is stated to be the fact that the work was not done at site. However, Mr. Shad, DW-1, being the witness of the petitioner admitted that the respondent was the only contractor doing the waterproofing work, which included the chajjas and the roof of health care and shopping centre and, thus, the claim has been allowed again calling for no interference.

20. The last aspect to be considered is the question of interest, which has been awarded @ 12% p.a. even

though the respondent claimed interest @ 18% p.a. The award of interest @ 12% p.a. taking into consideration the prevailing commercial rates cannot be doubted. In fact, this Court in various matters has been awarding the said rate of interest for the relevant period. The interest has been awarded from the date when the final bill became due for payment. This interest rate would apply till the date of the decree. The objections are accordingly dismissed.

21. In view of dismissal of the objections, the Award dated 30.10.2000 of the Sole Arbitrator, Justice J.K. Mehra (Retd.) is made Rule of the Court. The respondent will be entitled to future interest from the date of decree till the date of realization @ 9% p.a. simple interest. Parties are left to bear their own costs.

22. Decree-sheet be drawn up accordingly.

March 14, 2006
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SANJAY KISHAN KAUL, J.